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**“I HAVE LOVED YOU IN MY DREAMS”:
POSTHUMOUS REPRODUCTION AND THE NEED
FOR CHANGE IN THE UNIFORM
PARENTAGE ACT**

Susan C. Stevenson-Popp⁺

In a letter to his children, both those existing and those existing only as a future possibility, a man writes:

I address this to my children, because, although I have only two, . . . it may be that Deborah will decide – as I hope she will – to have a child by me after my death. I’ve been assiduously generating frozen sperm samples for that eventuality. If she does, then this letter is for my posthumous offspring, as well, *with the thought that I have loved you in my dreams, even though I never got to see you born.*¹

Today, with the sophisticated nature of alternative reproduction, a child may have as many as five different “parents.”² It is possible for a sperm donor, an egg donor, a surrogate host, and two non-genetically related individuals who intend to raise the child all to be considered

⁺ J.D. Candidate, May 2004, The Catholic University of America, Columbus School of Law. I would like to thank Professor Helen Alvaré for her insight and guidance throughout the writing process. I would also like to thank my parents, Rita and Bob, who tirelessly lend their love and support every day.

1. *Hecht v. Superior Court*, 16 Cal. App. 4th 836, 841 (Cal. Ct. App. 1993) (emphasis added). Forty-eight-year-old William E. Kane committed suicide on October 30, 1991 in a Las Vegas Hotel. *Id.* at 840. He had been living with thirty-eight-year-old Deborah Hecht for approximately five years prior to his death. *Id.* Kane was survived by two college-aged children from a former marriage. *Id.* Shortly before his death, Kane deposited fifteen vials of sperm in a sperm bank. *Id.* In his will, Kane bequeathed all “right, title, and interest” in the stored sperm to Hecht. *Id.* Kane wrote this letter to his children, Everett and Katy, approximately ten days before he took his life. *Id.* at 841. The ensuing legal battle over Kane’s sperm is discussed at length in this Comment. *See supra* text accompanying notes 63-76. It should be noted, however, that while the Court of Appeal of California upheld Kane’s will bequeathing his sperm to Hecht, this Comment and the proposed statute address only children conceived posthumously by a wife, using her deceased husband’s sperm. The discussion of Kane’s will and the resulting case, *Hecht v. Superior Court*, is used primarily to illustrate the importance of the decedent’s intent in determining the rights of posthumously conceived children.

2. John Lawrence Hill, *What Does It Mean To Be a “Parent”? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 355 (1991); ROBERT BLANK & JANNA C. MERRICK, *HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS* 99 (1995).

within this category of “parents.”³ This scenario, of course, assumes that these individuals are alive and active in the process of producing a child.

When a child is conceived using the preserved sperm of a deceased father, however, that child is called a “posthumous child.”⁴ Through the

3. Hill, *supra* note 2, at 355; SUSAN LEWIS COOPER & ELLEN SARASOHN GLAZER, CHOOSING ASSISTED REPRODUCTION: SOCIAL, EMOTIONAL AND ETHICAL CONSIDERATIONS, excerpt, at <http://preconception.com/resources/articles/social.htm> (last visited Apr. 5, 2003). Artificial insemination is the oldest and most common form of assisted reproductive technology, as well as one of the easiest and least expensive techniques. PAUL LAURITZEN, PURSUING PARENTHOOD: ETHICAL ISSUES IN ASSISTED REPRODUCTION 3 (1993); Christine A. Djalleta, Comment, *A Twinkle in a Decedent's Eye: Proposed Amendments to the Uniform Probate Code in Light of New Reproductive Technology*, 67 TEMP. L. REV. 335, 337 (1994); Stacey Sutton, Note, *The Real Sexual Revolution: Posthumously Conceived Children*, 73 ST. JOHN'S L. REV. 857, 861 (1999). The process involves using a pipette to insert sperm into a woman's uterus while she is ovulating. Sutton, *supra*, at 862. The procedure does not require assistance from a physician but is usually performed by one. *Id.* When the sperm comes from the woman's husband, the process is termed Artificial Insemination by Husband (AIH); when the sperm comes from a third-party donor, it is called Artificial Insemination by Donor (AID). *Id.* at 863. The sperm used in the procedure may or may not be previously frozen. *Id.* at 863-64. This Comment addresses only issues surrounding AIH.

4. E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & HEALTH 229, 231 n.19 (1987). Posthumous conception by a man's wife using her husband's frozen sperm is perhaps the least ethically problematic form of posthumous conception because, arguably, it promotes the idea of family. See Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance*, 33 HOUS. L. REV. 967, 1013 (1996) (“In its least problematic form—the desire of a wife to honor her love for a recently deceased husband by producing their child—artificial conception strikes me as supportive, even expressive, of the idea of a family.”). There are those who argue that posthumous conception is not in the best interests of the child. See Andrea V. Corvalan, Comment, *Fatherhood After Death: A Legal and Ethical Analysis of Posthumous Reproduction*, 7 ALB. L.J. SCI. & TECH. 335, 362-63 (1997). Corvalan quotes John Stuart Mill: “To bring a child into existence without fair prospect of being able, not only to provide food for its body, but instruction and training for its mind, is a moral crime, both against the unfortunate offspring and against society.” *Id.* at 336. The psychological burden to a child who is a product of posthumous reproduction is not fully known. See American Society of Reproductive Medicine Website [hereinafter ASRM Website] at <http://www.asrm.org/Media/Ethics/posthum.html> (Jan. 10, 1997). The ASRM states:

[T]he child at birth would be subject to the burden of having lost one genetic parent When reproduction takes place as a consequence of a loving relationship in which both partners were desirous of children, but a pregnancy is frustrated by the death of one partner, posthumous reproduction would ordinarily be well accepted both socially and culturally.

Id. The question has been raised, however, whether starting a family is prudent if death is anticipated. *Id.* Some claim that a child could be psychologically harmed by learning that he was conceived by a dead man; it is, however, noted that the psychological impact in this situation is arguably similar to that of any child raised without a father. Honorable Janet J. Berry, *Life After Death: Preservation of the Immortal Seed*, 72 TUL. L. REV. 231, 253 (1997). Still others argue that it should be recognized that any child born of assisted

use of advanced reproductive technology, children have been born using sperm up to ten years after the sperm was originally preserved.⁵ This process of storing sperm for later use has provided women with the ability to conceive children even after circumstances occur that would normally preclude them from conceiving children with their mates, such as their mates' sterility or death.⁶

reproductive technologies would favor the decision of the parent(s) to use those methods; otherwise, the child would not exist. BLANK & MERRICK, *supra* note 2, at 100-01.

5. Shapiro & Sonnenblick, *supra* note 4, at 234. The process of freezing eggs, sperm, or embryos in liquid nitrogen for future use is called "cryopreservation." GEOFFREY SHER ET AL., *IN VITRO FERTILIZATION: THE A.R.T. OF MAKING BABIES* 198 (1998). At normal body temperature, sperm can last twenty-four to forty-eight hours. Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 270 (1999). When sperm is frozen at temperatures as low as minus 100 degrees Celsius, it may be preserved for ten years or more. *Id.* Cryopreservation is the procedure that makes posthumously conceived children possible. Sutton, *supra* note 3, at 870. The process of freezing sperm was apparently discovered in 1866 by Montegazza, an Italian scientist. Shapiro & Sonnenblick, *supra* note 4, at 234. Montegazza proposed that frozen sperm banks could be used by widows whose husbands were killed in war. *Id.* In 1949, it was discovered that the addition of glycerol before freezing increased the chances that the sperm would survive the process. *Id.*

It is now medically possible to retrieve sperm from terminally ill or recently deceased males for the purpose of posthumous reproduction. ASRM Website, *supra* note 4. This procedure has raised a host of new issues relating to reproductive autonomy and death and is beyond the scope of this Comment.

6. The procedure of artificial insemination has been performed on animals for centuries. Shapiro & Sonnenblick, *supra* note 4, at 234. The first known successful artificial insemination of a human was performed in England in 1770 by a surgeon named John Hunter. *Id.* The practice first occurred in the United States much later. *Id.* In 1866, a physician named Marion Simms successfully inseminated a woman artificially. *Id.* Rather than being praised for his accomplishment, however, Simms' actions were met with disdain. *Id.* The unnatural manner of the pregnancy was not in agreement with the moral and religious beliefs of the time. *Id.*

A woman's eggs may also be cryopreserved for future use. THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *ASSISTED REPRODUCTIVE TECHNOLOGIES: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY* 298 (1998); BLANK & MERRICK, *supra* note 2, at 88. Practice differs from that of retrieval of cryopreserved sperm, however, because it requires the involvement of an additional female party to gestate the fertilized eggs and carry them to term. THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *supra*, at 298. The subject is therefore beyond the scope of this Comment.

One ethical question that is inevitably raised in the context of assisted reproduction is whether it is morally wrong to create a child using assisted reproduction when there are many children in the world who are alive and in need of homes. See COOPER & GLAZER, *supra* note 3; see also REPRODUCTION, ETHICS, AND THE LAW: FEMINIST PERSPECTIVES 30 (Joan C. Callahan ed., 1995) (discussing some of the advantages and drawbacks to adoption as compared with conceiving a child using assisted reproductive technologies); see also Berry, *supra* note 4, at 231 (calling a child born to a woman who has lost her

The issue of whether a posthumously born child is considered a child of a deceased parent is relevant mainly in the context of inheritance and benefit eligibility.⁷ Existing statutory law does not recognize a man who has preserved his sperm, for any of a variety of reasons, and dies before that sperm is used to conceive a child as a “father.”⁸ Lacking adequate statutory direction, courts are unsettled, unsure of how to apply traditional common law principles to evolving reproductive technology.⁹

husband or lover and uses assisted reproductive technologies to create the child a “souvenir baby”).

7. THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *supra* note 6, at 341; Sutton, *supra* note 3, at 860-61, 914 (noting that the issues surrounding posthumously conceived children can be separated into two categories: rights prior to gestation, including rights to the reproductive material, and rights after gestation, including the right of the child to inherit, as well as custody issues). *See generally* Banks, *supra* note 5, and notes 95, 97, and 133 *infra* (discussing Social Security survivor’s benefits for posthumously conceived children).

8. *See* UNIF. PARENTAGE ACT § 707 (2000) (amended 2002); UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 4 (1988); UNIF. PARENTAGE ACT § 4 (1973); *see also* THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *supra* note 6, at 359 (recommending that New York adopt the provision of the Uniform Status of Children of Assisted Conception Act, which provides that a man who dies before a child is conceived, using his sperm, is not a parent of the resulting child). *But cf.* RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 2.5 cmt. 1 (1999). The RESTATEMENT supports the view that a child conceived by artificial insemination of a wife using her deceased husband’s sperm, if born within a reasonable time after the husband’s death, should be treated as the husband’s child for purposes of inheritance from the husband. *Id.*

9. *See* Woodward v. Comm’r of Soc. Sec., 760 N.E.2d 257, 262 (Mass. 2002). The United States Supreme Court has not directly considered the constitutional issues surrounding children who are posthumously conceived using a deceased husband’s sperm. Robert J. Kerekes, *My Child . . . But Not My Heir: Technology, the Law, and Post-Mortem Conception*, 31 REAL PROP. PROB. & TR. J. 213, 227 (1996). In *Skinner v. Oklahoma*, however, the Court declared procreation to be “one of the basic civil rights of man” and “fundamental to the very existence and survival of the race.” JOAN BISKUPIC & ELDER WITT, *THE SUPREME COURT & INDIVIDUAL RIGHTS* 298 (1997) (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). It has been argued, however, that before traditional views about reproductive autonomy are applied to posthumous reproduction, as well as other forms of assisted reproduction, it is necessary to determine whether these methods involve the same ethical considerations as does traditional coital reproduction and what value is to be given to the methods. *See generally* John A. Robertson, *Symposium: Emerging Paradigms in Bioethics: Posthumous Reproduction*, 69 IND. L.J. 1027 (1994). Robertson notes:

The most difficult—and hence revealing—questions about procreative autonomy and the right to reproduce arise as we move away from the dominant cultural paradigm of a married couple conceiving offspring by coital reproduction. When reproduction occurs noncoitally through in vitro fertilization or with the aid of donors and surrogates, an initial question is whether the interests and values that make coital reproduction a valued activity apply at all. If the same procreative interests are implicated, then noncoital, collaborative reproduction should be protected to the same extent as coital reproduction. Because each noncoital

In January of 2001, however, the Supreme Judicial Court of Massachusetts handed down the landmark decision, *Woodward v. Commissioner of Social Security*.¹⁰ The court determined that, under certain circumstances, a child conceived through artificial insemination with a husband's sperm after the man's death could be considered the man's "issue" and could inherit from the man under state intestacy law.¹¹

This decision marks a significant departure from prior case law and clearly shuns existing statutory law pertaining to posthumously conceived children.¹² Given the new issues arising regarding posthumously

situation differs in some respect from the married coital model, however, a separate normative judgment must be made about the relative importance of the variation. The prevailing paradigm of procreative autonomy should control only after the interests and values at stake in coital reproduction are identified, and the extent to which they exist in the disputed noncoital situation is determined. *Unless we are prepared to protect every exercise of procreative autonomy regardless of the precise choice being made, a prior normative judgment about the importance of the interests at stake must first be made. Autonomy cannot be the sole guide in answering this question . . .*

Id. at 1029-30 (emphasis added) (footnote omitted). Robertson further notes that because posthumous reproduction, by definition, involves a deceased person, its value and meaning lie in the importance that individuals place on being able to direct the use of their gametes after death. *Id.* at 1031. An important question should be whether these values are as significant in the context of posthumous reproduction as they are in other reproductive experiences. *Id.* Reproduction is ordinarily "valued because of the genetic, gestational, and child-rearing experiences involved . . . [It] connects individuals with future generations and provides personal experiences of great moment in large part because persons reproducing see and have contact with offspring, or are at least aware that they exist." *Id.* A deceased person, whose gametes are used for posthumous reproduction, however, will not gestate, rear, or even know that he has reproduced genetically. *Id.* Robertson argues that this version of the experiences that normally make reproduction valuable is so attenuated that, arguably, it could be considered a reproductive experience of small importance and should not receive the high respect given to traditional reproductive experiences. *Id.* at 1032. Robertson also notes that the desire to make directives against posthumous reproduction are not equal to those values associated with the desire to avoid reproduction during life. *Id.* No unwanted gestation or child-rearing would occur, and the person will never know that he had offspring. *Id.* Robertson argues that before a person's reproductive autonomy can be allowed to control posthumous reproduction, it must be determined whether posthumous reproduction implicates the same interests, values, and concerns that traditional coital reproduction entails. *Id.* at 1031.

10. *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002).

11. *Id.* at 272; see *infra* Part I.D and accompanying notes (discussing the *Woodward* case); *infra* Part III (proposing a revision to the UPA dealing with the status of posthumously conceived children, based on the reasoning and requirements set forth in *Woodward* and the supporting reasons and policy for this change).

12. The UPA represents the current legislative view on the status of posthumously conceived children. UNIF. PARENTAGE ACT § 707 (2000) (amended 2002). The Act, however, has been adopted in only a few states. The first Uniform Parentage Act and the Uniform Status of Children of Assisted Conception Act have been adopted by a larger number of states. None of these acts provides adequate protection for a child conceived

conceived children, the time has come to reexamine and modify statutory law in light of the *Woodward* decision, in an attempt to provide greater protection for these children in certain situations.

This Comment examines the traditional common law view of posthumously conceived children and the changes in statutory and case law that have developed in response to new trends in assisted reproductive technologies. Next, this Comment analyzes *Woodward* and discusses its new approach to the issue of posthumously conceived children. This Comment also addresses the need for statutory law change in response to issues such as those raised in the *Woodward* case. This Comment then sets forth proposed changes to the Uniform Parentage Act, inspired by and derived partly from the *Woodward* opinion. It also addresses the advantages of changing statutory treatment of posthumously conceived children and the inevitable protests and dangers that could follow from these changes. Finally, this Comment concludes with a look toward the future, predicting the problems that courts will encounter, and the path of change that will inevitably come, as more cases like *Woodward* present themselves unless changes are made in existing statutory law.

Although there are extensive ethical and moral considerations that must be weighed in determining whether to allow a posthumous child to inherit from a deceased parent under these circumstances,¹³ this Comment primarily addresses the need for legal change in this area. The children currently born under these circumstances should not be neglected by the law while the ethical considerations surrounding their births are debated at length. A uniform system of guidance is needed now to allow the courts, when appropriate, to afford these children much-needed legal rights.

posthumously by a wife, using her deceased husband's sperm. See *infra* Parts I.B.1-3 and accompanying notes (discussing the inadequacies of the existing Uniform Acts in protecting the rights of the posthumously conceived child); *infra* Part III (proposing a statutory amendment to the UPA, which would provide greater protection to these children).

13. See *supra* notes 4 and 6 (discussing some of the ethical issues associated with posthumous reproduction); see also Robertson, *supra* note 9, at 1031. Robertson argues that before traditional moral and ethical values are applied to posthumous reproduction, it must first be determined whether these reproductive methods should be given the same value as traditional reproduction. *Id.*

I. PRIOR AND EXISTING LAW RELATING TO POSTHUMOUSLY CONCEIVED CHILDREN

A. Determining Heirs at the Date of Death: The Common Law Approach to Intestacy

An “heir” is “a person who, under the laws of intestacy, is entitled to receive an intestate decedent’s property.”¹⁴ When an individual dies without a will, the state intestacy statute provides the formula for distributing the decedent’s estate.¹⁵ Every state intestacy statute provides that, if a decedent leaves “issue,” the issue will receive a portion of the decedent’s estate.¹⁶ “Issue” are an individual’s descendants or those who follow in the decedent’s lineage.¹⁷ Under common law, heirs were fixed at the date of the decedent’s death.¹⁸ The exception to the rule was that children who were in gestation at the date of the father’s death, and who were born within the probable gestation period, could inherit as the decedent’s issue.¹⁹ This approach is still followed in most jurisdictions,

14. BLACK’S LAW DICTIONARY 727 (7th ed. 1999). An individual does not have heirs until death. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 131, 714 (6th ed. 2000). Prior to death, an individual has only “heirs apparent,” or those who are expected to receive the person’s property upon death. *Id.* at 131.

15. DUKEMINIER & JOHANSON, *supra* note 14, at 71-72; *see also* UNIF. PROBATE CODE § 2-101 (2002) (“Any part of a decedent’s estate not effectively disposed of by will passes by intestate succession to the decedent’s heirs as prescribed in this Code, except as modified by the decedent’s will.”).

16. *See* UNIF. PROBATE CODE § 2-103 (2002) (“Any part of the intestate estate not passing to the decedent’s surviving spouse under Section 2-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals designated below who survive the decedent: (1) to the decedent’s descendants by representation . . .”).

17. BLACK’S LAW DICTIONARY, *supra* note 14, at 455, 836.

18. *Woodward v. Comm’r of Soc. Sec.*, 760 N.E.2d 257, 262 (Mass. 2002) (acknowledging the common law rule but holding that, under certain circumstances, a child conceived through the use of artificial insemination with a husband’s sperm *after his death* could be considered a child of the husband for purposes of inheritance).

19. *Id.* at 262 n.10. Under common law, it is presumed that a child born to a married woman after her husband is dead but within 280 days of the husband’s death is the legitimate child of the husband, and the child is entitled to intestate succession rights. Christopher A. Scharman, Note, *Not Without My Father: The Legal Status of the Posthumously Conceived Child*, 55 VAND. L. REV. 1001, 1009 (2002). The Uniform Parentage Act extends this presumption to 300 days. *Id.* The 280- or 300-day period is an estimated measure of typical gestation and intends to protect the father’s estate from fraudulent claims. *Id.* This presumption protects the rights of children in gestation at the time of a father’s death; however, posthumous children, by definition, may include children born well after the 280- or 300-day presumptive period; these children cannot be deemed legal heirs and are denied intestate inheritance rights from the deceased parent’s estate. *Id.*; *see also* UNIF. PROBATE CODE § 2-108 (1990) (“An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more

and it has been adopted in several influential uniform laws; however, because children conceived posthumously are not in gestation at the date of one parent's death, they are not protected under the common law rule.²⁰

B. The Uniform Status of Children of Assisted Conception Act and the Uniform Parentage Acts (Old and New)

The National Conference of Commissioners on Uniform State Laws has repeatedly addressed the subject of nonmarital children.²¹ In 1973, the Conference approved the Uniform Parentage Act, which attempted to treat parents and children equally regardless of the marital status of the parents.²² The Act was subsequently adopted in nineteen states, with portions of the Act enacted in other states.²³ In 1988, the Conference adopted the Uniform Status of Children of Assisted Conception Act, which was intended to promote equal treatment for children conceived by non-traditional methods.²⁴ Most recently, in 2000, the Conference

after birth.”); Kerekes, *supra* note 9, at 214-15 (noting that new technologies have left legislative and judicial remedies far behind in the area of posthumously born children).

20. See, e.g., UNIF. PARENTAGE ACT § 204(a)(3) (2000) (amended 2002); UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 4(b) (1988); UNIF. PARENTAGE ACT § 4(a)(1) (1973).

21. See, e.g., UNIF. PARENTAGE ACT prefatory note (2000) (amended 2002); Laura Wish Morgan, *The New Uniform Parentage Act (2000): Parenting for the Millennium* (Apr. 2001), at <http://www.childsupportguidelines.com/articles/art200104.html>.

22. UNIF. PARENTAGE ACT prefatory note (2000) (amended 2002); UNIF. PARENTAGE ACT prefatory note (1973).

23. UNIF. PARENTAGE ACT prefatory note (2000) (amended 2002). The 1973 Uniform Parentage Act was adopted in the following states: Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Washington, and Wyoming. See Uniform Matrimonial, Family, and Health Laws Locator, at <http://www.law.cornell.edu/uniform/vol9.html> (last visited Apr. 6, 2003).

24. See UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT prefatory note (1988). In the prefatory note, the Conference noted that extraordinary progress in medical technology has produced miracles. *Id.* According to the Conference, these miracles “are here to stay,” and “[o]nce out, the genie will never return to the bottle.” *Id.* The Conference further stated:

This Conference is faced with the birth of many beautiful, innocent children brought into the world through certain extraordinary procedures which will ultimately require regulation, but meanwhile the status of these children demands our attention. These children are without traditional heritage, or parentage and other fundamentals; they are buffeted by forces beyond their comprehension and control. Although without guile or fault, but because of accident of birth, these children of the new biology have been deprived of certain basic rights.

Id. But see *infra* text accompanying notes 32-49 and 145-50 (discussing the inadequacies of the Uniform Status of Children of Assisted Conception Act, and the acts following it, as

integrated and expanded the two previous acts to produce the Uniform Parentage Act.²⁵ The Conference recommended that the two previous acts be withdrawn, and the new act be the Conference's only model statute addressing parentage.²⁶ Noting the country's "high nonmarital birthrate," the Conference stated that its main goal is "protecting the child, who had no voice in often-complex circumstances giving rise to the child's birth."²⁷

1. *The First Uniform Parentage Act*

The First Uniform Parentage Act's goal was to provide equal treatment for "legitimate" and "illegitimate" children under the law.²⁸ The Act adopts the common law view that a man is presumed to be a child's natural father if "he and the child's natural mother are or have been married to each other, and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court."²⁹ The Act contains one section pertaining to artificial insemination, which deals only with artificial insemination of a woman with sperm other than her husband's, and donation of a man's sperm for use by a woman other than his wife.³⁰ The Act does not specifically address a wife's use of her husband's sperm to conceive a child after his death.³¹ The Conference eventually addressed this issue in 1988, when it produced the Uniform Status of Children of Assisted Conception Act.³²

they apply to children posthumously conceived by a wife using her deceased husband's preserved sperm).

25. See Press Release, National Conference of Commissioners on Uniform State Laws, Uniform Parentage Act Revised (Aug. 3, 2000), available at <http://www.nccusl.org/nccusl/pressreleases/pr8-3-00-3.asp>.

26. UNIF. PARENTAGE ACT prefatory note (2000) (amended 2002).

27. *Id.*

28. See UNIF. PARENTAGE ACT prefatory note (1973). A "legitimate child" is defined as, "[a]t common law, a child born or begotten in lawful wedlock . . . [and m]odernly, a child born or begotten in lawful wedlock or legitimized by the parents' later marriage." BLACK'S LAW DICTIONARY, *supra* note 14, at 232. An "illegitimate child" is defined as "[a] child that was neither born nor begotten in lawful wedlock nor later legitimized." *Id.* Because marriage necessarily ends at death, "posthumously conceived children are always nonmarital children." *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 266-67 (Mass. 2002).

29. UNIF. PARENTAGE ACT § 4 (1973).

30. See *id.* § 5.

31. See generally *id.*

32. See UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 1(1)(ii) (1988).

2. *The Uniform Status of Children of Assisted Conception Act (USCACA)*

The self-stated purpose of the USCACA is "to effect the security and well-being of those children born and living in our midst as a result of assisted conception."³³ The prefatory note explains the strong preference of the Conference to provide a child with two parents; thus, the Act establishes a presumption of paternity in the husband of a married woman who conceives a child through assisted conception.³⁴ The burden is placed on the husband to establish lack of consent to paternity.³⁵ Although the USCACA states, in the section entitled "Assisted Conception By Married Woman," that presumptive paternity in the husband of a married woman who conceives a child through assisted conception "reflects a concern for the best interests of the children of assisted conception,"³⁶ in the next section of the Act, an individual whose sperm is used to conceive a posthumous child is excluded from the group afforded parental status.³⁷ The USCACA provides: "An individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child."³⁸ The comment to this section explains that the provision seeks to provide finality in the determination of parenthood; it also states that parenthood of these individuals ends at their death.³⁹ This is the only provision in the USCACA pertaining to procreation by a married couple.⁴⁰ The stated intention of the provision is to avoid problems with intestate succession that might arise if posthumous use of a person's genetic material allows the person to be considered a parent.⁴¹ The Act, however, does provide one alternative to this result: an individual may provide in his will for

33. *Id.* prefatory note.

34. *Id.*

35. *Id.*

36. *Id.* § 3 cmt.

37. *Id.* § 4.

38. *Id.* (emphasis added). See Karin Mika & Bonnie Hurst, *One Way To Be Born? Legislative Inaction and the Posthumous Child*, 79 MARQ. L. REV. 993, 1016-17 (1996). Mika and Hurst argue that this section of the USCACA does not satisfactorily address the status of a child born to a widow through artificial insemination. *Id.* On one hand, it can be argued that the child should be considered legitimate because the sperm was preserved during the marriage; thus, it is the husband's sperm with which the widow would be inseminated. *Id.* On the other hand, it can be argued that the child should not be considered legitimate because the husband is deceased and the marriage terminated; thus, at the time of insemination, the widow is inseminated with the sperm of a man who is no longer her husband. *Id.*

39. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 4 cmt. (1988).

40. See *id.*

41. *Id.* § 4 cmt.

children posthumously conceived.⁴² The USCACA has been adopted in only two states, North Dakota and Virginia.⁴³

3. *The New Uniform Parentage Act*

With the 2000 version of the Uniform Parentage Act (UPA), the Conference expanded and attempted to replace both the 1973 Uniform Parentage Act and the Uniform Status of Children of Assisted Conception Act.⁴⁴ Once again, the Conference adopted the common law view that a child in gestation at the time of the husband's death creates a presumption of paternity.⁴⁵ Article 7, entitled "Child of Assisted Reproduction," pertains to children conceived by means other than sexual intercourse.⁴⁶ The UPA provides that if a husband provides sperm for, or consents to, his wife's use of the sperm, he is the father of a resulting child.⁴⁷ Section 707 specifically addresses the parental status of

42. *Id.*

43. The provision in the North Dakota Code that is based on the USCACA provides: "A person who dies before a conception using that person's sperm or egg is not a parent of any resulting child born of the conception." N.D. CENT. CODE § 14-18-04(2) (Michie 1997). The portion of the Virginia provision based on the USCACA provides:

Any child resulting from the insemination of a wife's ovum using her husband's sperm, with his consent, is the child of the husband and wife notwithstanding that, during the ten-month period immediately preceding the birth, either party died.

However, any person who dies before in utero implantation of an embryo resulting from the union of his sperm or her ovum with another gamete, whether or not the gamete is that of the person's spouse, is not the parent of any resulting child unless (i) implantation occurs before notice of the death can reasonably be communicated to the physician performing the procedure or (ii) the person consents to be a parent in writing executed before the implantation.

VA. CODE ANN. § 20-158 (Michie 2000 & Supp. 2002); *see also* Scharman, *supra* note 19, at 1011-12. Scharman notes that Virginia's version of the USCACA contains one very important difference from the original Act: the Virginia statute allows a deceased parent to "affirmatively claim a legal relationship with the child if he 'consents to be a parent in writing executed before the implantation.'" *Id.* at 1012. This provision allows a person to claim legal status as a parent of a posthumous child by expressing his intent in writing while still alive. *Id.* This provides little protection to the child, however, because it does not allow the posthumous child to receive intestate inheritance rights. *Id.*

44. UNIF. PARENTAGE ACT prefatory note (2000) (amended 2002).

45. *Id.* § 204. Section 204 provides: "A man is presumed to be the father of a child if . . . he and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce[, or after a decree of separation] . . ." *Id.*

46. UNIF. PARENTAGE ACT § 701 (2002) (amended 2002). The Uniform Parentage Act defines "assisted reproduction" as "a method of causing pregnancy other than sexual intercourse. The term includes: (A) intrauterine insemination; (B) donation of eggs; (C) donation of embryos; (D) in-vitro fertilization and transfer of embryos; [and] (E) intracytoplasmic sperm injection." *Id.* § 102.

47. *Id.* § 703.

a deceased spouse, stating that “[i]f an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.”⁴⁸ The UPA applies only to the determination of parentage; however, a determination of parentage can significantly affect determinations involving benefits and inheritance.⁴⁹

C. Judicial Treatment of Posthumous Reproduction Cases

Courts have had few opportunities to address the rights of posthumously conceived children.⁵⁰ Of the existing cases, however, a few should be noted for their treatment of these issues.

Parpalaix v. CECOS brought to light the issues of posthumous insemination and paved the way for American courts that would later consider the issue.⁵¹ In *Parpalaix*, the French Tribunal de grand instance ordered the Centre d’Etude at de Conservation du Sperme (CECOS), a government-run sperm bank, to deliver stored sperm of a decedent to the doctor of his surviving wife.⁵² Alain Parpalaix had deposited his sperm at CECOS after learning he suffered from testicular cancer, but he left no instructions regarding future use of the sperm.⁵³ As his condition

48. *Id.* § 707.

49. *Id.* § 103 cmt. (noting that the UPA was amended to apply only to determinations of parentage due to concern that the previous version was overbroad and could interfere with other state laws).

50. Scharman, *supra* note 19, at 1013 (urging the “importance of establishing legal standards for determining the rights of posthumous children”).

51. Shapiro & Sonnenblick, *supra* note 4, at 229-33 (citing the GAZETTE DU PALAIS, Sep. 15, 1984, at 11-14, as their source of information on *Parpalaix* but leaving it unclear as to whether this is an official or unofficial report of the case).

52. *Id.* at 233.

53. *Id.* at 229-30. The chemotherapy procedures associated with testicular cancer are designed to kill germ cells, which presents the risk of infertility to those who undergo the procedures. See Testicular Cancer Resource Center Fertility Page, at <http://tcrc.acor.org/fertility.html> (last visited Apr. 6, 2003). Germ cells generate sperm; thus, once a male has finished chemotherapy treatment, his sperm count is likely to be considerably lower than it was prior to the chemotherapy. *Id.* Though sperm levels will eventually return to normal in some men, in others, the sperm will not return. *Id.* The Website explains: “Because of the high probability of an indefinite period of infertility following chemotherapy, we strongly recommend that men facing chemotherapy bank some sperm before starting treatments.” *Id.*; see also Shapiro & Sonnenblick, *supra* note 4, at 235 (explaining that men who fear sterility as a result of disease, chemotherapy, or exposure to hazardous substances, as well as men who have undergone vasectomies but wish to retain the option of having children, may be wise to preserve sperm; the frozen sperm is a so-called “fertility insurance”).

deteriorated, he married his girlfriend, Corinne, and soon after, he died.⁵⁴ Corinne requested the sperm from CECOS, but CECOS denied her request.⁵⁵ The sperm bank argued that its legal obligation was solely to the donor and that sperm was an indivisible part of the body, which was not inheritable unless a decedent left clear instructions.⁵⁶ The French court refused to apply contract principles to the case; it also refused to characterize sperm as an indivisible part of the body.⁵⁷ Instead, the court said that sperm was “the seed of life . . . tied to the fundamental liberty of a human being to conceive or not to conceive.”⁵⁸ The court explained that the future of the sperm should be decided by the person from whom it came; thus, the deciding issue is intent.⁵⁹ The court examined Alain’s intent to determine whether that intent could be considered “unequivocal.”⁶⁰ Based on the testimony of Corinne and Alain’s parents, the court concluded that Alain had a strong desire for his wife to be the mother of their child.⁶¹ Less than ten years later, an American

54. Scharman, *supra* note 19, at 1014 (calling *Parpalaix* the “case that ushered in the post-mortem insemination era”).

55. Shapiro & Sonnenblick, *supra* note 4, at 230; *see also* Corvalan, *supra* note 4, at 340. Corinne and the Parpalaix family relied on two arguments in attempting to establish that they were heirs and owners of the sperm. Shapiro & Sonnenblick, *supra* note 4, at 230. First, they argued that Alain’s sperm was moveable property, and, thus, inheritable. *Id.* Second, they maintained that Corinne had a moral right to the sperm because Alain married Corinne only shortly before his death with the intent for her to use the sperm to have children after his death. *Id.*

56. Shapiro & Sonnenblick, *supra* note 4, at 231. CECOS also argued that depositing Alain’s sperm had been “purely therapeutic” and that courts should not extend that therapy to posthumous reproduction. Corvalan, *supra* note 4, at 340-41.

57. Shapiro & Sonnenblick, *supra* note 4, at 232.

58. *Id.* (quoting the GAZETTE DU PALAIS, Sept. 15, 1984, at 12).

59. *Id.*

60. *Id.*

61. *Id.* The court looked at several different factors to determine Alain’s intent. Gail A. Katz, Note, *Parpalaix v. CECOS: Protecting Intent in Reproductive Technology*, 11 HARV. J.L. & TECH. 683, 686-87 (1998). The fact that no contract existed providing instructions for any posthumous use of the sperm did not indicate that Alain never intended for Corinne to use the sperm. *Id.* Because Corinne and Alain had been married only two days, the court decided that Alain’s parents were the best people to shed light on the intent of their child. *Id.* at 687. Because Alain’s parents supported Corinne’s artificial insemination using Alain’s sperm, the court inferred that Alain would also support that decision. *Id.* In addition, the court decided that Alain and Corinne presumably married immediately before his death to make it easier for her to obtain and use his sperm to bear a child. *Id.* Finally, Alain had no way of knowing CECOS’s policy pertaining to deceased donor sperm, so the absence of his written consent could not be considered evidence that he did not consent to use of his sperm after his death. *Id.* The court concluded that “the formal will of Corinne’s husband to make his wife the mother of a common child” had been established. Shapiro & Sonnenblick, *supra* note 4, at 232 (quoting the GAZETTE DU PALAIS, Sept. 15, 1984, at 13). Corinne was finally artificially inseminated with Alain’s

court relied on the *Parpalaix* analysis to determine that a decedent had a property interest in sperm, and could bequeath it by will to another person.⁶²

In *Hecht v. Superior Court*,⁶³ the Court of Appeal of California considered *Parpalaix* in deciding whether a decedent's sperm was property that he could bequeath to his girlfriend.⁶⁴ In the *Hecht* case, William Kane committed suicide and was survived by two older children from a prior marriage.⁶⁵ Kane had previously deposited fifteen vials of sperm in a sperm bank and signed a "Specimen Storage Agreement" providing that, in the event of his death, the sperm should either continue to be stored or be released to the executor of his estate, depending upon the direction of the executor.⁶⁶ In a provision entitled "Authorization to Release Specimens," Kane authorized the release of the sperm to his girlfriend, Deborah Ellen Hecht, or to her physician.⁶⁷ In his will, Kane named Hecht executor of his estate and bequeathed all "right, title, and interest" in the sperm to her.⁶⁸ Kane's will also expressed his desire for Hecht, should she choose, to become impregnated with his sperm and bear a child either before or after his death.⁶⁹

When, after Kane's death, Hecht attempted to claim his sperm, the sperm bank refused to release it.⁷⁰ Kane's children petitioned for an order to have the sperm destroyed, or, alternatively, have all or most of the sperm released to them.⁷¹ The children argued that the destruction of

sperm one year after he died. *Id.* at 233. However, due to the small amount and poor quality of the sperm, Corinne did not become pregnant. *Id.*

62. *Hecht v. Super. Ct.*, 16 Cal. App. 4th 836, 855-56 (Cal. Ct. App. 1993).

63. *Id.* at 839-40.

64. *Id.* at 855-58.

65. *Id.* at 840.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* Under a section of his will entitled "Statement of Wishes," Kane wrote:

It being my intention that samples of my sperm will be stored at a sperm bank for the use of Deborah Ellen Hecht, should she so desire, it is my wish that, should [Hecht] become impregnated with my sperm, before or after my death, she disregard the wishes expressed in Paragraph 3 above [pertaining to disposition of decedent's "diplomas and framed mementoes,"] to the extent that she wishes to preserve any or all of my mementoes and diplomas and the like for our future child or children.

Id.; see also *supra* note 1 and accompanying text (discussing the letter Kane wrote to his existing children, as well as any future children Hecht might have, about the circumstances surrounding Kane's death).

70. *Hecht*, 16 Cal. App. 4th at 842.

71. *Id.* at 843.

their father's sperm would (1) prevent the birth of children who would not have an opportunity to know their father or an opportunity to be raised in a traditional family, and (2) prevent problems in the existing family by after-born children, as well as prevent "additional emotional, psychological and financial stress" on existing family members.⁷² Following a court order allowing the sperm to be destroyed, Hecht filed a petition to vacate the order.⁷³

The court first considered whether Kane had a property interest in his sperm, concluding that "the decedent's interest in his frozen sperm vials, even if not governed by the general law of personal property, occupies 'an interim category that entitles them to special respect because of their potential for human life.'"⁷⁴ The court explained that "[a]lthough it has not yet been joined with an egg to form a preembryo . . . the value of sperm lies in its potential to create a child after fertilization, growth, and birth."⁷⁵ According to the court, at the time of Kane's death, he had an ownership interest in his sperm and had decision-making authority concerning its use for reproductive purposes; thus, he could determine the ultimate fate of his sperm.⁷⁶

Few courts have actually been faced with the question of rights of a posthumous child who has already been born.⁷⁷ In *In re Estate of Kolacy*,⁷⁸ the Superior Court of New Jersey, Chancery Division, Probate Part held that, notwithstanding the common law rule to the contrary, two posthumously conceived children could inherit from the estate of

72. *Id.* at 844.

73. *Id.* at 844-45.

74. *Id.* at 846 (quoting *Davis v. Davis*, 842 S.W. 2d 588, 597 (Tenn. 1992)).

75. *Id.* at 850.

76. *See id.* at 849; Kerekes, *supra* note 9, at 219. Kane's children argued that the court should adopt a state policy against posthumous conception, claiming that the practice essentially creates "orphaned children by artificial means with state authorization." *Hecht*, 16 Cal. App. 4th at 858. The court noted in response that the argument is lacking in support to establish that it, or any court, should be responsible for making the judgment as to whether a potential child should be born, assuming that both parents want to conceive the child. *Id.* The court stated:

We also disagree with [the children's] claim that any order other than destruction of the sperm is tantamount to "state authorization" of posthumous conception of children, *i.e.*, the creation of public policy *in favor of* such conception. In such a case, the state is simply acknowledging that "no other person or entity has an interest sufficient to permit interference with the [sperm-provider's] decision . . . because no one else bears the consequences of these decisions the way that the [sperm providers] do."

Id. (quoting *Davis*, 842 S.W. 2d at 602).

77. *See Sutton*, *supra* note 3, at 893 (noting that, although more posthumous children are being born, most of the births have not been opposed, resulting in little litigation).

78. *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).

William Kolacy as his heirs under the New Jersey intestate laws.⁷⁹ Kolacy had harvested his sperm after he was diagnosed with leukemia in case either the disease or the treatment for the disease caused him to become infertile.⁸⁰ Kolacy died, and his wife united her eggs with her deceased husband's sperm through in vitro fertilization.⁸¹ Twin girls were born to Mrs. Kolacy approximately eighteen months after the death of her husband.⁸² The Social Security Administration denied dependent's benefits to the twin girls, based on a determination that the girls were not children of the decedent.⁸³ Mrs. Kolacy brought an action seeking a declaration that her twins were among the class of persons considered the decedent's intestate heirs to support her claim under the Social Security Act.⁸⁴

Based on certifications from Mrs. Kolacy and her doctor, the court concluded that the twins were "genetically and biologically the children of [the decedent] William Kolacy."⁸⁵ In examining the state intestacy statute, the court noted a "basic legislative intent to enable children to take property from their parents and through their parents from parental relatives."⁸⁶ Although acknowledging that it had not previously dealt with this specific issue, the court interpreted the general legislative intent as seeking to provide amply for children of a decedent.⁸⁷ Because the court had already established that the children were the offspring of the decedent and there were no administrative concerns or competing claims to the decedent's estate, the court held that the children should be recognized as William Kolacy's legal heirs under the intestate laws of New Jersey.⁸⁸

In most of the opinions dealing with posthumously conceived children, the courts have either stated or implied that it should be the legislature that addresses the issues arising from new reproductive technologies. In *Kolacy*, in response to the state's argument that courts should not become involved in the types of issues presented in the case, the court stated:

[We] think it would be helpful for the Legislature to deal with these kinds of issues. In the meanwhile, life goes on, and people

79. *Id.* at 1264.

80. *Id.* at 1258.

81. *Id.*

82. *Id.*

83. *Id.* at 1259.

84. *Id.*

85. *Id.* at 1258-59.

86. *Id.* at 1262.

87. *Id.*

88. *Id.* at 1262-64.

come into the courts seeking redress for present problems. We judges cannot simply put those problems on hold in the hope that some day (which may never come) the Legislature will deal with the problem in question.⁸⁹

In a bold move, however, the Supreme Judicial Court of Massachusetts chose not to wait for the legislature, and devised its own remedy to the issue of the rights of posthumous children.

D. Woodward v. Commissioner of Social Security: The Case That Could Change It All

In *Woodward v. Commissioner of Social Security*,⁹⁰ decided in January of 2002, the Supreme Judicial Court of Massachusetts considered the question:

If a married man and woman arrange for sperm to be withdrawn from the husband for the purpose of artificially impregnating the wife, and the woman is impregnated with that sperm after the man, her husband, has died, will children resulting from such pregnancy enjoy the inheritance rights of natural children under Massachusetts' law of intestate succession?⁹¹

Lauren and Warren Woodward, a childless married couple, had decided to withdraw and preserve a quantity of Warren's semen after being informed that Warren had leukemia and needed treatment that could leave him sterile.⁹² After an unsuccessful bone marrow transplant, Warren died.⁹³

Two years later, Lauren became artificially impregnated using the preserved semen and gave birth to twin girls.⁹⁴ Within three months of the girls' birth, Lauren applied for child's survivor benefits and mother's survivor benefits under the Social Security Act.⁹⁵ The Social Security Act

89. *Id.* at 1261. In other cases, courts have shied away from placing limits on the uses of new reproductive technology, interpreting the legislature's silence as its refusal to become involved in certain aspects of the issue. The *Hecht* court noted a statement by the California Supreme Court in a case involving a surrogacy contract: "[i]t is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so" *Hecht v. Super. Ct.*, 16 Cal. App. 4th 836, 861 (Cal. Ct. App. 1993) (quoting *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993)).

90. *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002).

91. *Id.* at 259.

92. *Id.* at 260.

93. *Id.*

94. *Id.*

95. *Id.* See generally Banks, *supra* note 5 (discussing the history and mechanics of Social Security survivor's benefits). Banks examines the question of whether Social Security survivor's benefits should be made available to posthumously conceived children.

provides “child’s benefits to dependent children of deceased parents who die fully insured under the Act.”⁹⁶ A widow of a fully insured individual could only receive mother’s benefits under the Act if she had a child or children entitled to child’s survivor benefits.⁹⁷ The Social Security Administration denied Lauren’s application for benefits and determined that she had not established that the twins were Warren’s “children” under the Act.⁹⁸ The Social Security Administration remained unconvinced, even after Lauren obtained a judgment of paternity and an order to amend the twins’ birth certificates to declare her husband as the girls’ father from the Probate and Family Court.⁹⁹ A United States administrative law judge agreed, concluding that the children were not entitled to inherit from the husband under the intestacy and paternity laws of Massachusetts and, thus, did not qualify for benefits.¹⁰⁰ The judge’s decision was affirmed by the Social Security Administration appeals council, and Lauren sought a declaratory judgment from the United States District Court for the District of Massachusetts to reverse the Administration’s ruling.¹⁰¹ Because no applicable Massachusetts precedent existed that could be applied in the case, the United States District Court judge certified the question to the Supreme Judicial Court of Massachusetts.¹⁰²

Id. at 257-58. Banks notes that under the Act, there is only one plausible, yet unlikely, way for posthumously conceived children to qualify for survivor’s benefits. *Id.* at 258. Banks notes that “[t]he Act presumes paternity and dependency of applicants who qualify as heirs under the intestate laws of the deceased parent’s state of domicile.” *Id.* at 258-59. Presumably, then, were the states to adopt a method of proving paternity such as the test set out in *Woodward*, which is illustrated in the proposed statute, *infra* Part III, Social Security survivor’s benefits would be easier for posthumously conceived children to obtain. If the presumption were in favor of the surviving spouse’s husband as a parent of a resulting child, subject to certain requirements of proof by the surviving spouse as set forth in the proposed statute, paternity of the decedent would be established under state intestacy law and the child would then qualify for Social Security survivor’s benefits. Banks suggests that one approach to the problem of providing Social Security survivor’s benefits for posthumously conceived children would be to “embark upon a nationwide campaign to adopt a Uniform Rights of Posthumous[ly] Conceived Children Act.” *Id.* at 259. The other approach would be to amend state paternity and inheritance laws. *Id.*

96. *Woodward*, 760 N.E.2d at 260 n.3 (quoting U.S. Social Security Act, 42 U.S.C. § 402(d)(1) (1994)).

97. *Id.* at 260. Under Section 402(g)(1), the U.S. Social Security Act provides “mother’s benefits to the widow of an individual who died fully insured under the Act, if . . . she has care of a child or children entitled to child’s benefits.” *Id.* (citing 42 U.S.C. § 402(g)(1) (1994)) (emphasis added).

98. *Id.*

99. *Id.* at 260-61.

100. *Id.* at 261.

101. *Id.*

102. *Id.* (stating that “a determination of these children’s rights under the law of Massachusetts is dispositive of the case”).

Noting that no court of last resort had considered the issue of whether posthumously conceived children were entitled to inheritance rights under state intestacy laws, the court concluded that, under certain circumstances, these children could inherit from the deceased parent.¹⁰³ The government based its position on common law principles, arguing that posthumously conceived children are not “in being” at the time of the parent’s death and are thus barred from receiving inheritance rights.¹⁰⁴ Lauren argued that because the children have a clear genetic connection to the deceased parent, posthumously conceived children should always be considered heirs of the deceased parent under intestate succession laws.¹⁰⁵

The court rejected both arguments and looked to the state intestacy statute for guidance in answering the question.¹⁰⁶ The court examined three important state interests implicated by the issue before it: “the best interests of children, the State’s interest in the orderly administration of estates, and the reproductive rights of the genetic parent.”¹⁰⁷ Using these

103. *Id.* at 272.

104. *Id.* at 262.

105. *Id.* Lauren Woodward is quoted in an Associated Press article as saying, “Why should my children be treated differently from anyone else’s children? [Warren] is their father. That’s it. I don’t know how much more clear it can be made.” Denise Lavoie, *Conception After Dad’s Death Blurs Inheritance Law*, SOUTH COAST TODAY, Sept. 1, 2001, available at <http://www.s-t.com/daily/09-01/09-01-01/a04sr022.htm>.

106. *Woodward*, 760 N.E.2d at 262. The court noted that the applicable “posthumous child” provision of the Massachusetts intestacy statute does not specifically limit the class of posthumous children to those already in utero at the decedent’s death. *Id.* at 262. The Massachusetts “posthumous child” provision states: “Posthumous children shall be considered as living at the death of their parent.” MASS. GEN. LAWS ANN. ch. 190, § 8 (West 2002). The court noted that, although cases relied upon by the administrative law judge affirmed the general common law principle that heirs are determined at the date of death, the intestacy statute supersedes any state common law. *Woodward*, 760 N.E.2d at 262 n.10. The court further noted that, although the “posthumous children” provision of the intestacy statute indicates a legislative intent to preserve wealth for consanguineous descendants, the legislature left the term “posthumous children” undefined. *Id.* at 264. Despite numerous amendments to the Massachusetts intestacy laws, the court recognized that the “posthumous children” provision has been virtually unchanged for 165 years. *Id.* The court contrasted the Massachusetts “posthumous children” provision, which does not define the term, with a provision of the Louisiana intestacy statute. *Id.* at 262. The relevant provision of the Louisiana intestacy statute provides: “A successor must exist at the death of the decedent.” LA. CIV. CODE ANN. art. 939 (West 2000).

107. *Woodward*, 760 N.E.2d at 264-65. The court first considered the legislative intent to promote the best interests of children. *Id.* at 265. The court noted that “the protection of minor children, most especially those who may be stigmatized by their ‘illegitimate’ status,” is a primary goal of the court as well as the legislature. *Id.* The court stated that the legislature has “[r]epeatedly, forcefully, and unequivocally” expressed the idea that “all children be ‘entitled to the same rights and protections of the law’ regardless of the accidents of their birth.” *Id.* According to the court, all children have the right to financial support from their parents and their parents’ estates. *Id.* The court pointed out

state interests as guidelines, the court concluded that, in limited circumstances, a posthumously conceived child may be considered "issue" of a deceased parent and may receive inheritance rights under Massachusetts' intestacy law.¹⁰⁸ The court noted:

Posthumously conceived children may not come into the world the way the majority of children do. But they are children nonetheless. We may assume that the Legislature intended that such children be "entitled," in so far as possible, "to the same rights and protections of the law" as children conceived before death.¹⁰⁹

The court formulated two requirements that posthumously conceived children must meet before enjoying inheritance rights as issue under intestacy law. In order to receive inheritance rights as issue of a deceased parent, a genetic link between the posthumously conceived child and the decedent must be demonstrated.¹¹⁰ In addition, the decedent must have consented to posthumous conception and to the support of any child resulting from the conception.¹¹¹

that assisted reproductive technologies making posthumous reproduction possible have been in existence for a long time, and the legislature has not made any move to narrow the statutory class of posthumous children to expressly deny them the right to take through intestacy. *Id.* In addition, the court stated that it has "consistently construed statutes to effectuate the Legislature's overriding purpose to promote the welfare of all children, notwithstanding restrictive common-law rules to the contrary." *Id.* at 266.

The court then considered the legislative purpose of providing certainty to heirs and creditors by promoting the orderly administration of estates. *Id.* Allowing a posthumously conceived child to inherit from a deceased parent automatically reduces the intestate share available to children born before the decedent's death. *Id.* The court acknowledged that the state intestacy statute, by requiring proof of paternity between the decedent and his issue, and by establishing a limitation on the amount of time during which a claim may be made against the intestate estate, furthers the legislative purpose. *Id.* at 266-67.

The third important state interest focuses on honoring the reproductive choices of individuals. *Id.* at 268. The court noted that although "individuals have a protected right to control use of their gametes, . . . [a] prospective donor parent must clearly and unequivocally consent . . . to posthumous reproduction [and] . . . to the support of any resulting child." *Id.* at 269. After the donor-parent's death, the surviving parent bears the burden of proving affirmative consent by the decedent. *Id.*

108. *Id.* at 272.

109. *Id.* at 266.

110. *Id.* at 272 (emphasizing that proof of a genetic connection is a "threshold" matter).

111. *Id.*

II. WHY IT IS TIME FOR A CHANGE

As the uses of reproductive technologies expand, so too will the number of posthumously born children.¹¹² Because it is possible to preserve sperm for many years after death, courts will be confronted with children attempting to assert claims against a decedent's estate long after the decedent sperm provider has died. Courts are growing tired of legislative inaction on the issue and are seeking more appropriate remedies in these cases.¹¹³ The UPA is not sufficient to satisfy this need and provides a remedy that courts are becoming unwilling to apply. It is time to change the law's view of posthumous children, and *Woodward* provides excellent guidelines for legislatures making these changes.

A. *Why Woodward Should Be a Model for Legislatures*

While the UPA has the noble goal of protecting the children of assisted reproductive technologies, the Act falls short of achieving its stated purpose. While in many respects the Act provides much-needed legal shelter for these children, it fails to provide protection for a resulting child in the situation in which a man preserves his sperm to have a child with his wife, clearly desiring to be the parent of the resulting child, but dies before the child is born.¹¹⁴ *Woodward's* two-part requirement addresses this situation while still allowing for the possibility that the decedent did not intend for his spouse to use his sperm to

112. *Id.*

113. See *supra* note 89 and accompanying text (discussing the courts' comments indicating that the time has come for legislatures to address the subject of posthumously conceived children).

114. See Kerekes, *supra* note 9, at 222 ("Although the Uniform Parentage Act provides a clear vehicle for establishing the parent-child relationship, other statutory provisions are sadly out of synchronization with modern technological advances and deny rights of succession to persons that the Act determines are children of dead parents."). One of the most harmful effects of denying posthumous children a legal relationship with their deceased father may be the lack of resources of the birth family. See Scharman, *supra* note 19, at 1024-25. Scharman notes that posthumous children are typically born into a single-parent home, and it is reasonable to assume that resources will be limited. *Id.* Denying a posthumous child inheritance rights and benefits will put even greater strain on the family. *Id.* Moreover, Scharman notes that intestate inheritance statutes are intended to "approximate a decedent's wishes" when that person did not have the opportunity to express them. *Id.* at 1025. Because a parent would presumably desire to provide support for any posthumous children, Scharman argues that an intestate statute denying inheritance rights to a posthumous child is "inconsistent with the longstanding purpose of intestate succession As one commentator has noted, it is 'illogical to assume a decedent would desire to prevent a genetic child from sharing in the estate.'" *Id.*; see also Banks, *supra* note 5, at 375-77 (discussing the possibility of conditioning the "ability to procreate posthumously on a person's ability and willingness to financially support and care for resulting children.").

reproduce after his death.¹¹⁵ *The Restatement (Third) of Property: Wills and Other Donative Transfers* supports the Woodward approach.¹¹⁶ The *Restatement* adopts the view that a posthumously conceived child should be considered a child of a decedent husband if born within a reasonable amount of time after the decedent's death.¹¹⁷ Woodward's approach, supported by the *Restatement*, can be used as a model to correct the deficiencies in the Uniform Parentage Act.

115. For an interesting look at the situation that arises when a decedent either clearly opposed posthumous reproduction or where the decedent's intentions are unknown, see Anne Reichman Schiff, *Arising From the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901 (1997). Schiff argues that where a decedent clearly expressed his wish that his gametes not be used for posthumous reproduction, ignoring the decedent's wishes would amount to unacceptable coercion. *Id.* at 945.

116. RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 2.5 cmt. 1 (1999).

117. *Id.* The RESTATEMENT has contemplated the situation in which a decedent dies before conception of a child using his sperm and desires to be a parent of the resulting child. It presumably supports recognizing as a child, for purposes of inheritance, a child born by assisted reproductive technologies using the father's sperm, if born within a reasonable time period after the father's death. It states:

The development of a great variety of reproductive technologies raises the question of how to treat a child who is produced by some such means. In general, such a child should be treated as part of the family of the parent or parents who treat the child as their own and raise the child, one or both of whom might not be the child's genetic parent. One reproductive technology that does not raise any legal issue is artificial insemination of a wife with the semen of her husband, a procedure referred to as artificial insemination by husband (AIH). A child conceived by this method is the genetic child of both husband and wife. . . . [T]he traditional view is that a child who is conceived and born after the decedent's death cannot be an heir. This proposition, however, is open to reexamination with respect to a child produced from genetic material of the decedent by assisted reproductive technology. Most statutory codifications . . . are not inconsistent with such a reexamination because they do not preclude inheritance by a child conceived after the decedent's death. They merely provide that a child who is in gestation at the decedent's death is treated as then living. This Restatement takes the position that, to inherit from the decedent, a child produced from genetic material of the decedent by assisted reproductive technology must be born within a reasonable time after the decedent's death in circumstances indicating that the decedent would have approved of the child's right to inherit. A clear case would be that of a child produced by artificial insemination of the decedent's widow with his frozen sperm. *If the AIH procedure occurs after the husband's death, and if the child is born within a reasonable time after the husband's death, the child should be treated as the husband's child for purposes of inheritance from the husband. Once conceived, such a child is the husband's and wife's child for all purposes of inheritance by, from, or through an intestate decedent who dies thereafter.*

Id. (emphasis added) (citations omitted).

1. Genetic Connection

Today's technologically advanced medical science allows the first requirement of the *Woodward* test to be satisfied easily.¹¹⁸ The test provides that a posthumously conceived child may be considered issue of a decedent where a genetic relationship can be established between the child and the decedent.¹¹⁹ DNA tests on the child can establish this relationship fairly easily.¹²⁰

2. The Intent and Consent of the Decedent

Judicial decisions have long required proof of the decedent's intent before enforcing a devise of sperm under a will and before approving a wife's use of her deceased husband's sperm to conceive a child.¹²¹ In *Parpalaix*, the decedent's intent was used to allow a wife to inseminate herself with her husband's sperm after his death.¹²² The court considered testimony of the decedent's wife and family and found that the decedent intended to have a child with his wife, even posthumously.¹²³ The *Hecht* court followed the lead of the French court in *Parpalaix*, which placed great importance on the decedent's intent, and relied on documents,

118. See Genelex: The Paternity DNA Testing Site, at <http://www.genelex.com/paternitytesting/paternityhome.html> (discussing DNA paternity testing and stating that "DNA testing has made the process [of determining parentage] convenient and the results conclusive" and that "[i]n all but the rarest of instances, the DNA test results provide a level of certainty so high that paternity will, for all practical purposes, be proven or disproved") (last visited May 8, 2003).

119. *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 259 (Mass. 2002).

120. *Id.* at 267. The court notes that "sophisticated modern testing techniques now make the determination of genetic paternity accurate and reliable." *Id.* DNA testing can be performed post-mortem to determine paternity. See DNA Diagnostics Center Website (offering a variety of commercially available DNA paternity tests), at <http://www.dnacenter.com/specialservices.html> (last visited Jan. 27, 2003).

121. Sutton, *supra* note 3, at 900 (noting that the main focus of many posthumous reproduction cases is to determine the intent of the decedent); see also John L. Gordon, Note and Comment, *Successive Rights of Posthumously Conceived Children*, 18 J. Juv. L. 84, 91 (1997) (discussing courts' focus on intent in cases involving many different kinds of reproductive technologies). But see Robertson, *supra* note 9, at 1029-30 (arguing that a decedent's autonomy over his gametic material should not be the only consideration involved in posthumous reproduction and arguing that directions for or against posthumous reproduction deserve much less respect than decisions about reproduction when a person is alive). See Corvalan, *supra* note 4, at 351-52 (noting that courts have found it easier to allow posthumous reproduction when actual evidence of intent exists, such as explicit or written intent of the decedent's wishes). Corvalan suggests that *Hecht* best represents a case in which the decedent's intent is clear because Kane expressed, in writing and on numerous occasions, his desire for his girlfriend, Deborah, to use his sperm to conceive a child posthumously. *Id.* at 351-52; see *supra* notes 63-76 and accompanying text (discussing the *Hecht* case).

122. See *supra* notes 51-62 and accompanying text.

123. Shapiro & Sonnenblick, *supra* note 4, at 229-33.

including the decedent's will, which expressed his intent that his girlfriend have and use his sperm to conceive a child after his death.¹²⁴

The second threshold requirement under *Woodward* provides that the survivor must establish: (1) that the decedent affirmatively consented to posthumous conception and (2) that the decedent consented to the support of any resulting child.¹²⁵ Although the *Woodward* court did not address whether Lauren Woodward met her burden and proved her husband's consent to a posthumous child, the court speculated as to what evidence could be considered to establish her husband's intent.¹²⁶ The court noted that statements from the decedent's family or records from the fertility institute that demonstrate the husband's acknowledgement of the children might be influential in determining consent.¹²⁷ The court also noted that although a birth certificate can be considered prima facie evidence of parentage, "genetic and legal parentage are not always coterminous."¹²⁸

Courts are unsettled as to what evidence is sufficient to prove evidence of the decedent's intent and consent to have and to support posthumous children.¹²⁹ It is likely that written statements acknowledging a desire to

124. *Hecht v. Super. Ct.*, 16 Cal. App. 4th 836, 840 (Cal. Ct. App. 1993).

125. *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 259 (Mass. 2002).

126. *Id.* at 270. The court noted the information Lauren Woodward had provided in her attempt to prove her husband's consent to posthumous children:

In pertinent part, the factual record contains a brief affidavit that [Woodward] submitted to the Probate Court judge in her action to amend the children's birth records, a physician's letter that was submitted in that action, and a transcript of [Woodward's] testimony before the administrative law judge. [Woodward's] affidavit attests only that [her] husband's sperm was extracted and preserved "because my husband and I wanted to have children from our union." The two-sentence notarized physician's letter, addressed to [Woodward's] attorney, was from the director of Reproductive Endocrinology and Fertility Services of Malden Hospital. He wrote that, on February 3, 1995, [Woodward] "had a twin pregnancy" as a result of her insemination with her husband's "frozen/thawed semen" and that "we were notified that she delivered twins in October, 1995." Before the administrative law judge [Woodward] testified only that she and [her] husband had discussed with doctors whether she would "be able to have children, [the husband's] children," should [her] husband's bone marrow transplant not succeed. At the time, the couple had been told that [Warren's] leukemia treatments might render him sterile, if he survived. [Woodward] further testified that [her] husband "agreed" with her that "if something should happen . . . I would still be able to have his children."

Id. at 270-71 n.24.

127. *Id.*

128. *Id.*; see also BLANK AND MERRICK, *supra* note 2, at 99-100 (noting that donor insemination raises questions about paternity because it creates a distinction between genetic fatherhood and legal fatherhood).

129. See *Woodward*, 760 N.E.2d at 270-71 (noting that the law is "unsettled" as to what evidence is required to prove a decedent's intent to have and support a posthumous child).

conceive a child, even after death, and expressing the decedent's wish to be a parent of that child would go far in establishing consent.¹³⁰ However, the mere fact that a man preserved his sperm cannot alone establish his consent to use of the sperm to conceive a child after death.¹³¹ Under existing law, it is clear that more would be required to prove consent.¹³² In addition, because of the surviving spouse's strong motivation to prove this consent, more evidence will be required than a simple declaration by the surviving spouse that the decedent wanted children, even after death.¹³³ Although some states require a man to sign

It has been argued that statutes dealing with posthumous children should be "worded so as to require clear evidence of intent and consent, thereby preventing fraud and unwanted posthumous conceptions, while protecting the rights of those survivors who genuinely want these children." Sutton, *supra* note 3, at 925.

130. See Scharman, *supra* note 19, at 1047-48. Scharman suggests that in the absence of express intent from the decedent, states should prescribe other factors that could be used by a posthumous child to establish the decedent's intent. *Id.* at 1048. Letters, oral statements, or other preparations that are typically taken by parents hoping for a future child could be used to establish a person's intent to bear a child, even a posthumous child. *Id.* But see Schiff, *supra* note 115, at 953 (suggesting that it may be unduly burdensome to individuals in some cases to require a written statement to establish consent to posthumous reproduction). Schiff argues that a serious, specific, and clear oral statement showing an individual's desire to procreate posthumously should be regarded as sufficient to prove consent. *Id.* at 953.

131. Schiff, *supra* note 115, at 950. Schiff notes:

[W]hile there may be a general intent to procreate in the future and to do so by employing technological means, the act of cryopreservation, by itself, does not provide evidence of an intent to procreate under all and any circumstances, including after death. For example, it is quite likely that a person may store gametes in anticipation of undergoing chemotherapy, with the aim of using those gametes if the treatment were successful in controlling the disease. It cannot be concluded, however, that the individual has acquiesced to what is arguably an entirely different set of circumstances, namely that a child should be brought into existence when one of the biological parents is deceased.

Id. (footnotes omitted).

132. See Woodward, 760 N.E.2d at 271 ("It is undisputed . . . that the husband is the genetic father of the wife's children. However, . . . that fact, in itself, cannot be sufficient to establish that the husband is the children's legal father for purposes of the devolution and distribution of his intestate property."). But cf. *In re Estate of Kolacy*, 753 A.2d 1257, 1263-64 (N.J. Super. Ct. Ch. Div. 2000) ("[G]iven the facts of this case, including particularly the fact that William Kolacy by his intentional conduct created the possibility of having long-delayed after born children . . . it is entirely fitting to recognize that [the children] are the legal heirs of William Kolacy . . ."). Many legal scholars have addressed the issue of what should be required to prove consent to posthumous reproduction. Some have argued for a "clear and convincing" standard of proof in these cases, preferring stronger evidence of intent in light of the potential conflict of interests that may arise within a family struggling with these issues. Schiff, *supra* note 115, at 953.

133. See Schiff, *supra* note 115, at 950-51. Schiff argues:

If the deceased's interests are to be safeguarded adequately in posthumous reproduction, a high standard of evidence of an intent to reproduce after death ought to be required. The risk exists in these cases . . . that a family member may

a consent form before the preservation of his sperm, these forms may or may not include a provision authorizing the surviving spouse to use the preserved sperm in the event of the provider's death.¹³⁴ Moreover, these forms would not be helpful in determining whether the decedent consented to the support of any children produced after death, although

apply his or her own values, rather than attempt to ascertain what the individual would have wanted [T]he temptation may be very great for family members to portray the deceased's values and desires regarding posthumous conception in ways that serve their own interests in procreation.

Id. at 953. *But cf. Kolacy*, 753 A.2d at 1263 ("I accept as true Mariantonia Kolacy's statement that her husband unequivocally expressed his desire that she use his stored sperm after his death to bear his children.").

134. See Michelle L. Brenwald & Kay Redeker, *A Primer on Posthumous Conception and Related Issues of Assisted Reproduction*, 38 WASHBURN L.J. 599, 633 (1999). Brenwald and Redeker note that "[s]tandardized consent forms pose one of the largest problems for attorneys in this area." *Id.* at 633. Further, the authors argue:

One initial document in which consent should be scrutinized is the agreement between the couple and the reproductive clinic with which they are working. If the consent form lacks certain provisions, questions arise, such as how to dispose of the sperm after a specific time period, who is the owner of the sperm (clinic versus couple), and what is done with the remaining sperm after the wife has conceived. An attorney should be prepared to draft an independent contract on these matters, particularly if the couple wishes to affirm the desire for a potential posthumous child.

Id. at 634. If properly drafted, however, it can be speculated that these consent forms would assist the surviving spouse in meeting the requirement under *Woodward* that the decedent affirmatively consented to use of his sperm to conceive a child after his death. See THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *supra* note 6, at 315. With respect to disposition of frozen gametes, the Task Force concluded:

New York's gamete bank regulations should require gamete banks to ask individuals storing gametes for future use with an intimate partner to specify their instructions for disposition of their gametes after death The regulations should require gamete banks to use their best efforts to ensure that any gametes remaining in storage after the depositor's death are disposed of in accordance with the depositor's instructions.

Id. The Task Force further noted:

Most of the dilemmas surrounding the posthumous use of gametes stored for future use with an intimate partner can be avoided by requiring, at the time the gametes are frozen, specific instructions for the disposition of any gametes remaining after death The available options should include . . . release to a specific person (identified either by name or in general terms, such as "my wife at the time of my death")

Id. at 315; see also Scharman, *supra* note 19, at 1047 (encouraging states to establish a formal method for fathers to indicate, at the time of preservation of sperm, their intent to conceive a child and also to claim a legal relationship with the child by specifying whether they want their sperm used posthumously to conceive a child and by whom); ASRM Website, *supra* note 4 (noting that many assisted reproduction programs use consent forms that provide instructions for use of gametes and embryos after the death of the donor and stating that "[p]rograms are urged to insist that donors make their wishes known").

consent forms could be expanded to include a provision relating to support of any resulting child.¹³⁵

B. Anticipated Problems Under Woodward

Whether a posthumous child is considered a child, and therefore, issue of a deceased parent, is most relevant in determining whether that child will be able to inherit from the decedent and receive benefits as the decedent's child.¹³⁶ Several problems could foreseeably arise as a result of using the two-part *Woodward* test to allow a posthumous child to be considered a child of the decedent and enjoy inheritance rights as the decedent's issue. Legal scholars have long warned of the dangers arising under the Rule Against Perpetuities, especially the risk that a child could assert a claim to a decedent's estate many years after the decedent's death.¹³⁷ The Rule provides that a gift creating a conditional future interest is not valid unless it must vest within a life in being at the time of the creation of the interest plus twenty-one years.¹³⁸ The Rule was designed to prevent future gifts that could possibly vest (e.g., become certain as to the identity of the taker) at remote times in the future.¹³⁹ Because cryopreservation allows sperm to be preserved for an undetermined length of time, there is a fear that a claim against a decedent's estate could arise many years in the future, preventing efficient administration of estates.¹⁴⁰ In the case of a posthumously conceived child, however, this argument is not valid. By using the life of the surviving spouse as the "measuring life," a gift to a posthumously

135. See Brenwald & Redeker, *supra* note 134, at 635-36 ("One possible solution would be requiring all facilities that store sperm to require donors to sign a specific intent form, which allows for some flexibility or personalization.").

136. See THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *supra* note 6, at 341; Sutton, *supra* note 3, at 914; see also Banks, *supra* note 5, at 302. When examining the best interests of the unconceived child, Banks notes:

Some administrative accommodation for posthumously conceived children in their pursuit of survivor's benefits is reasonable. As it stands, the Act virtually excludes them as a subclass from benefiting from their own deceased parent's actual contributions into a social retirement insurance program. Unconceived, as well as unborn, children understandably have some degree of moral expectancy of being supported by their predeceased biological or intended progenitors.

Banks, *supra* note 5, at 302.

137. See Sutton, *supra* note 3, at 916.

138. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 291 (4th ed. 1998) (citing JOHN C. GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942)).

139. *Id.* at 292.

140. See Sutton, *supra* note 3, at 916; Djalleta, *supra* note 3, at 366. See generally Les A. McCrimmon, *Gametes, Embryos and the Life in Being: The Impact of Reproductive Technology on the Rule Against Perpetuities*, 34 REAL PROP. PROB. & TR. J. 697 (2000) (examining the possibility of treating the embryo as a life in being when considering issues of reproductive technology and the Rule Against Perpetuities).

conceived child would necessarily have to vest within twenty-one years after the mother's death because, in instances of married couples, the surviving spouse would be the only person with a desire to bear the child.¹⁴¹

As provided in the USCACA, a person who preserves his sperm is free to include a provision in his will indicating that, in the event of death, any child conceived using that sperm should inherit as his child.¹⁴² This is, of course, the easiest method to provide for posthumous children. The Act, however, fails to consider a situation where the decision to preserve sperm might have been last-minute, prompted by a fear that a given medical treatment might result in sterility.¹⁴³ This solution also fails to

141. See Sutton, *supra* note 3, at 916.

142. UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 4 cmt. (1988). Professor Winthrop Thies suggested that a person attempting to plan for circumstances in which posthumous conception could be a possibility should provide for a specific procedure in his will. Shapiro & Sonnenblick, *supra* note 4, at 245. Thies suggested the will should include a provision instructing that

[a]fter each artificial insemination treatment, both the widow and the physician should make an affidavit swearing that the treatment was performed using the testator's sperm. If the procedure is successful, the widow, doctor, and hospital should be required to file a second affidavit within 120 days of the birth of the child stating the birth date, the name and sex, and whether the child survived 90 days. If the child so survives, it will be deemed the testator's child and may inherit according to the will.

Id. at 245 n.124. Thies explains that the will may designate other survival periods and suggests that the will should set limits on the number of births. *Id.* One commentator has proposed an amendment to the Uniform Probate Code to reflect a requirement that a posthumous child will not be able to inherit from the decedent unless it is expressed in the decedent's will. Djalleta, *supra* note 3, at 369-70. Djalleta's proposed amendment to the Uniform Probate Code reads: "A child resulting from the in utero implantation of an embryo created by the union of the testator's sperm or ovum with another gamete, after the testator's death, shall not receive a share of the testator's estate unless specifically provided for in the will." *Id.* at 370. Djalleta also discusses imposition of a statute of limitations for claims against a decedent's estate as a possible solution to the problem of a posthumous child attempting to assert a claim many years in the future. *Id.* at 365; see also Brenwald and Redeker, *supra* note 134, at 651 (recommending that an attorney instruct his client to indicate specifically in his will the desired method of disposition of preserved sperm). But see Evelyne Shuster, *The Posthumous Gift of Life: The World According to Kane*, 15 J. CONTEMP. HEALTH L. & POL'Y 401, 414 (1999). Shuster points out that a provision in a will providing for posthumous children may serve to promote a view that women are "reducible to their reproductive functions" by creating a feeling of obligation in a widow to use the sperm left behind by her husband. *Id.* ("Because women are subjected to all sorts of psychological, cultural, and societal pressure to be mothers, the gift-exchange of sperm creates a strong moral, psychological, and social imperative on some women to want, or at least appear to want, the ability to bear children.")

143. Numerous Websites dedicated to cancer and cancer treatment recommend that a male preserve sperm before undergoing chemotherapy. See UPMC Cancer Centers, *Cancer Information*, at <http://www.upmccancercenters.com/cainformation/chemotherapy.html> (last modified Jan. 13, 2003); The Royal Marsden Hospital, *Patient Information*, at

address a situation of unexpected death, after a husband and wife have preserved sperm for later use. In this case, the couple may not have considered, or have had reason to consider, the possibility of a desire to procreate after the death of one of them. It is evident why a blanket statutory statement stating that a person may provide for a posthumous child in his will simply does not cover every situation in which a posthumous child may be born.¹⁴⁴

III. THE NEED FOR STATUTORY CHANGE

It is clear that a change regarding the law's treatment of posthumous children would be best received if it came from the legislature.¹⁴⁵ Some hoped that the UPA or another statute would address the issue.¹⁴⁶ While

<http://www.royalmarsden.org/patientinfo/booklets/chemotherapy/sexuality.asp> (last visited Apr. 10, 2003); Infertility and IVF Center, *Cryopreservation*, at <http://www.ivfctrstl.org/cryo-who.htm> (last visited Apr. 10, 2003).

144. See Scharman, *supra* note 19, at 1024 (noting that the USCACA's provision may provide relief for some because it allows a person who wishes to provide for a posthumous child to do so in a will, but overall, this approach may not be effective because most people die intestate); Kerekes, *supra* note 9, at 225-26. Kerekes notes that those who most logically would be inclined to use the sperm preservation method are relatively young persons, who may not consider estate planning a priority. Kerekes, *supra* note 9, at 225-26. Kerekes further explains that, even if a will exists, a bequest to "my issue," "the heirs of my body," or even "my children," might fail in the face of every definition that excludes a conceived child." *Id.* at 226.

145. Berry, *supra* note 4, at 256. Berry notes:

Historically, courts have refused or failed to address public policy issues of new reproductive technologies. As quickly as courts deal with one issue of new reproductive technology, a new technology is developed which creates even more complicated issues. These new technologies continue to wreak havoc with probate proceedings, parentage, and procreative constitutional issues. Two classes of citizens, whose rights have been given limited attention, are (1) children born of the new reproductive technologies and (2) minor children whose inheritance rights may be affected by future siblings born from the frozen sperm of their deceased fathers Lawmakers . . . must grasp the magnitude of the problems associated with new reproductive technologies. They must . . . begin to develop a cogent public policy [C]omprehensive legislation must be drafted to address not only the rights of individuals, but also the rights of children who, through no fault of their own, often become victims of new reproductive technology rather than beneficiaries.

Id. (footnote omitted); see Sutton, *supra* note 3, at 922-25. Sutton argues that "any statute that attempts to notably limit the availability of reproductive assistance, or to restrict when or how a child may be conceived or provided for, might be held to the constitutional strict scrutiny standard, [which] few statutes pass." *Id.* at 923 (footnote omitted). Sutton predicts that cases involving assisted conception and posthumously conceived children will inevitably reach the Supreme Court because the constitutional issues surrounding them have not been adequately addressed by lower courts. *Id.* at 924.

146. See Sutton, *supra* note 3, at 929 (calling the Uniform Parentage Act "not nearly comprehensive enough"). The Uniform Rights of the Posthumously Conceived Child Act was proposed in 1971 by Professor Winthrop Thies. Shapiro & Sonnenblick, *supra* note 4,

the UPA failed to provide the needed guidance for states on the issue of posthumously conceived children, it is not too late. *Woodward* clearly illustrates the need for a different statutory stance on the issue. A statute is necessary to guide state legislatures in providing for these children. *Woodward* also provides a sound starting point for a statute addressing the issue of posthumously conceived children. The threshold requirements set out in the decision reflect careful analysis of judicial decisions before it, with a focus on the decedent's intent and consent as key to determining whether a posthumously conceived child may be considered a child of a decedent. Although it is far from a perfect solution to the problems raised by the issue of posthumous children, *Woodward* provides the necessary impetus for statutory change in this area.

Building upon the language of the existing UPA, a statutory amendment to the Act reflecting the reasoning and requirements of *Woodward* might provide:

A husband who provides for, or consents to, assisted reproduction by his wife is the father of a resulting child.

If a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse may be considered a parent of the resulting child for purposes of benefits and inheritance only if:

at 244. Thies argued that the Act should include provisions for many circumstances that are still at issue today, such as rights of a posthumously conceived child when the decedent has provided for the child in his will and rights of the child where the will is silent. *Id.* at 244-45 n.123. Thies also proposed a "cut-off" point, providing how late after the decedent's death a child could be born and still be protected under the Act. *Id.*; see also Kerekes, *supra* note 9, at 245-49.

Kerekes sets forth a Proposed Uniform Status of Posthumously Conceived Children Act, in which he attempts to introduce new standards for determining paternity of a posthumously conceived child. Kerekes, *supra* note 9, at 245-49. The proposed statute reads, in relevant part:

[A] posthumously conceived child shall be the child of the donors of the gametic material that resulted in the birth of the child. In making a determination as to whether a child is the genetic child of a purported parent, the court shall consider, but not be limited to, relevant scientific test results, the testimony of the custodian of the frozen gametic material or pre-embryo, and the testimony of the licensed medical personnel who participated in the assisted posthumous conception.

Id. at 248. Kerekes proposes a five-year time limit during which a posthumously conceived child may request a determination of his status as a posthumously conceived child. *Id.* The proposed statute further provides that if a child is determined to be a posthumous child of a decedent within the applicable time period, "the child shall share in the distribution of the estate either pursuant to the will or in accordance with the governing intestate statute." *Id.* at 248-49. If stored gametic material is used after the limitations period has run under the statute, a child conceived from the material will "have no claim as a child of the deceased donor of the gametic material." *Id.* at 249.

(a) The deceased spouse consented in a record, on file with the providing sperm bank, or the physician who performed the artificial insemination procedure, that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the resulting child, or

(b) The surviving spouse, who seeks support for a biological child of her own, conceived with the decedent's sperm, can prove the following:

That there is a genetic relationship between the deceased spouse and the child, and

That the deceased spouse consented to conception after death and to the support of any resulting child.

The surviving spouse may prove this consent by providing clear and convincing evidence of the decedent's oral or written statements concerning the conception and support of a child after death.¹⁴⁷

A statute that includes provisions such as these should provide a reasonable time limit, such as two years, during which the sperm could be used to conceive a child.¹⁴⁸ Any child born after the conclusion of the time limit would be barred from asserting any claims against the decedent's estate.¹⁴⁹ This type of provision would protect any children born before the decedent's death from the risk of future claims, beyond a reasonable period, which might diminish their inheritance; in essence, this rule would allow the estate to be administered in a more efficient fashion.¹⁵⁰

147. This proposed amendment to the UPA is written using language from the existing UPA, combined with the requirements set forth in the *Woodward* case. See *infra* Part I.D and accompanying notes (discussing the *Woodward* decision); see also *infra* Parts II-III and accompanying notes (discussing the advantages and disadvantages of adopting the *Woodward* approach as the new approach to determining rights of posthumously conceived children).

148. See Sutton, *supra* note 3, at 926. Sutton suggests retaining a certain percentage of a decedent's estate in trust to be held for a specified length of time. *Id.* If no child is born within that period, the portion held in trust would be returned to the estate and distributed accordingly. *Id.*; see also Corvalan, *supra* note 4, at 364. Corvalan suggests that in cases where a decedent's intent is clear, any resulting children should not be classified as illegitimate but should be allowed to inherit through a will or by receiving an intestate share. Corvalan, *supra* note 4, at 364. Corvalan further recommends, however, that a two-year time limitation should be imposed in order to effectuate an efficient distribution of the decedent's estate. *Id.* Corvalan notes that because "these 'clear intent' children are not illegitimate, the federal and state governments should not be allowed to deny these children entitlements." *Id.*

149. See Corvalan, *supra* note 4, at 364.

150. See *id.*

IV. CONCLUSION

Despite the efforts of legislatures to keep pace with new reproductive technology, the UPA fails to address adequately the issues surrounding posthumously conceived children, and thus, fails to provide fundamental guidance to state legislatures and courts in this area. Past judicial decisions indicate the courts' desire to effectuate the decedent's intent and afford rights to a posthumously conceived child where the intent clearly indicates a desire to conceive a child, even after death.

Woodward v. Commissioner of Social Security provides an excellent starting point for new statutory guidelines regarding posthumously conceived children and should be used as a tool to create new legislation. Reproductive technologies are evolving. It is necessary for the UPA to change as well as provide a strong model for state legislatures in this difficult area of the law. Until the legislature speaks, when attempting to deal with these issues, courts will be forced to draw upon scattered judicial opinions and statutes lacking necessary provisions.¹⁵¹ In addition,

151. The *Woodward* court noted:

As these technologies advance, the number of children they produce will continue to multiply. So, too, will the complex moral, legal, social, and ethical questions that surround their birth. The questions present in this case cry out for lengthy, careful examination outside the adversary process, which can only address the specific circumstances of each controversy that presents itself. *They demand a comprehensive response reflecting the considered will of the people.*

Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 272 (Mass. 2002) (emphasis added); see also Berry, *supra* note 4, at 253. Berry remarks:

New reproductive technology continues to confound courts, legislators, and social science commentators. Until legislators act, courts will be called upon to patch together remedies which may not be in the best interest of the litigants or to create sound public policy on behalf of children born from these new technologies.

Berry, *supra* note 4, at 253.

Most recently, in October of 2002, the United States District Court for the District of Arizona was confronted with the dilemma of whether to afford Social Security survivor's benefits to a posthumously conceived child. *Gillett-Netting v. Comm'r of Soc. Sec.*, 231 F. Supp. 961, 963 (D. Ariz. 2002). As is commonly the case, a man preserved sperm before undergoing chemotherapy treatments for cancer. *Id.* The man died, and his wife was inseminated with his sperm almost a year after his death; his wife later gave birth to twins. *Id.* The wife applied for Social Security survivor's benefits on behalf of the twins, and after several of her appeals were denied, she brought the matter before the court seeking judicial review of the denials. *Id.* at 964. The court applied Arizona intestacy law and determined that because the children were not in gestation at the time of the husband's death, they could not inherit from the deceased husband. *Id.* at 966-67. Although the wife claimed that the purpose of intestacy law is to effectuate the decedent's intent and that her husband intended for her to bear his children even after his death, the court held that the decedent's intent is not a factor in determining distribution of a decedent's estate. *Id.* The court distinguished *Woodward*, explaining that the posthumous child provision of the Massachusetts' intestacy statute in that case did not specifically require that children be in existence at the date of the decedent's death. *Id.* at 967-68. In contrast, the Arizona

as reproductive technologies advance, the possibility that children could be born to a widow using her deceased husband's sperm long after the husband has died will continue to plague courts, as these children seek benefits and inheritance rights as children of the deceased parent. Until the legislature takes the necessary steps to provide for posthumously conceived children, these children will be left not only without a parent, but also without the opportunity to enjoy recognition and rights as a child of that deceased parent.

intestacy statute contains no posthumous child provision and specifically requires that to be an heir of a decedent, the child must be in gestation at the time of the decedent's death. *Id.* at 968. The court ultimately held that the twins were not eligible for Social Security survivor's benefits as children of their deceased father because they were not in gestation at the time of his death. *Id.* 970. This case clearly shows the need for a new statutory stance on the issue of posthumous children and poignantly illustrates courts' reluctance to apply new law until they have legislative guidance. It also demonstrates the need to change the existing UPA in order to provide effective guidance to state legislatures in moving forward on a path of change. *See infra* Part III and accompanying notes (proposing an amendment to the UPA that reflects the reasoning and requirements set forth in the *Woodward* case).

